In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 284

PETER AUGUSTUS BENDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury-waived trial in the United States District Court for the Central District of California, petitioner was convicted of knowingly failing and refusing to be inducted into the Armed Forces as ordered, in violation of 50 U.S.C. App. 462 (I R. 2-3, 20, 27). On March 24, 1969, he was sentenced to imprisonment for three years pursuant to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (I R. 28). On appeal the conviction was affirmed (Pet. App. 1-2).

The government's evidence at trial consisted of petitioner's Selective Service file,[1] which showed that on May 15, 1961, petitioner registered with Local Board No. 125, Milton, Massachusetts. When he completed his classification questionnaire on October 21, 1963, he made no claim to be a conscientious objector (F. 10). On January 14, 1964, he was classified I-A; from February 1964 until February 10, 1966, he was classified II-S (student deferment); he was then reclassified I-A (F. 13).

On February 25, 1966, and March 10, 1966, the local board received written notice from petitioner and the Office of Economic Opportunity, respectively, that he had been accepted for one year's service in VISTA (Volunteers in Service to America) (F. 24-26). On March 25, 1966, the local board classified petitioner I-A; this classification was changed by the State Appeal Board in Massachusetts on May 13, 1966, to II-A (occupational deferment) until April 13, 1967 (F. 13, 31, 42, 46).

On May 11, 1967, the local board extended petitioner's II-A classification until April 1968 (F. 13). After being advised on December 20, 1967, by the Office of Economic Opportunity that petitioner had terminated his services with VISTA (F. 53), the local board reclassified petitioner I-A on January 11, 1968 (F. 13). Petitioner appealed and on March 21, 1968, the appeal board voted 4-0 to continue his I-A classification (F. 13, 79).

---

[1] We are filing with the Clerk of this Court a copy of petitioner's Selective Service file, to which we refer as "F."

On April 4, 1968, the local board ordered petitioner to report for induction on April 19, 1968, at Milton, Massachusetts (F. 13, 81). On April 8, 1968 (after receipt of his induction notice), petitioner wrote a letter to the local board claiming to be a conscientious objector, requesting an SSS Form 150, and asking for a personal appearance before the board (F. 82). On that same day, petitioner wrote letters and requested intervention in his case by the National Director of Selective Service (F. 84-85), the State Selective Service Director in Massachusetts (F. 86-87), and the State Selective Service Director in California (F. 88-89). In none of these three letters did petitioner mention conscientious objection.

On April 10, 1968, the local board notified petitioner that his induction was postponed until May 21, 1968 (F. 93, 131). On April 22, 1968, petitioner returned his SSS Form 150 with attached letters (F. 94-116). These documents stated, *inter alia*, that petitioner had attended religious schools (except for a three-year period) prior to going to Boston University. Petitioner further stated: "This religious training has been a major influence in the establishment of my feelings, values, and convictions. * * * The religious training acquired here, based on Christian Love, compassion and understanding, coupled with the guidance provided by my mother and father have been the sources from which I acquired the belief which is the basis of my claim in Series I above. * * * It has been this background and upbringing that fostered my feelings for the love and feeling for others" (F. 99). Petitioner also detailed his VISTA

activities (F. 102, 110-116). On April 26, 1968, the local board notified petitioner that the conscientious objector information submitted did not warrant a reopening of his classification (F. 14, 132). The board specifically found that petitioner's beliefs after receipt of the induction order were "no different than before," and by a vote of 5-0 voted not to reopen his classification (F. 128).

On April 30, 1968, the Massachusetts State Headquarters notified petitioner that neither that office nor the California State Headquarters felt that his VISTA employment (which he had resumed in 1968) warranted intervention on their part (F. 133). On May 17, 1968, petitioner requested transfer to a California local board to report for induction on a date it would fix (F. 139). The transfer request was granted, and on May 29, 1968, a local board in Los Angeles ordered him to report for induction on June 11, 1968 (F. 143). Petitioner reported to the induction center in Los Angeles on that date, but refused to submit to induction (F. 150-151).

At trial petitioner testified that at the time he filled out his classification questionnaire he was not a conscientious objector (II R. 4-5, 12.) He testified that his C.O. beliefs did not mature until after he received his induction order (II R. 13, 15). In its findings the trial court stated (II R. 21, 23-24):

> * * * None of the letters nor anything in Form 150 indicates that Mr. Bender's conscientious objection crystallized after April 4, 1968 [date of the induction order]. All the information indicates, as I interpret it, that his conscientious ob-

> jection to war existed prior to April 4, 1968, and well prior. The Board in a five to nothing decision decided not to reopen the matter with respect to the claim of conscientious objection, and that was on April 25th. In their letter denying the reopening they state that they found Mr. Bender's belief after the Induction Order to be no different than before.
>
> * * * * *
>
> So I do not find that the record before the Board establishes the fact of conscientious objection belief on the part of Mr. Bender that matured or crystallized after the induction order was received. I find there was basis in fact in the record for the conclusion of the Board and that the defendant is guilty as charged.

1. As noted, due to petitioner's work in the VISTA program, he was reclassified from I-A to II-A in May 1966 by the Massachusetts appeal board (F. 13, 42, 46), and, in May 1967, his II-A classification was extended until April 1968 (F. 13). On January 11, 1968, the local board reclassified petitioner I-A, after being advised by the Office of Economic Opportunity that petitioner had terminated his services with VISTA (F. 13, 53). On March 21, 1968, the California appeal board affirmed the I-A classification (F. 13), and both the California and Massachusetts State Headquarters refused to intervene on petitioner's behalf (F. 133).

There is no substance to the claim (Pet. 14-15) that petitioner was improperly deprived of a continuation of his II-A classification. Petitioner had in effect already received a two-year deferment because of his

VISTA employment; no additional period of deferment was mandatory since there was no showing in the administrative record that petitioner could not "be replaced because of a shortage of persons with his qualifications or skill in such activity"—an essential condition necessary for such deferment (32 C.F.R. 1622.23(2); Pet. App. 7).[2] See *Petrie* v. *United States*, 407 F. 2d 267, 275-276 (C.A. 9); *United States* v. *Weersing*, 415 F.2d 130, 133 (C.A. 9), certiorari denied, 396 U.S. 987. In this regard, it is also significant to note that petitioner testified at the trial that he refused induction only on the ground of denial of his conscientious objector claim, not on the basis of denial of a II-A classification (II R. 13-14).

2. Petitioner's claim to classification as a conscientious objector was rejected under 32 C.F.R. 1625.2—which provides that a local board shall not reopen a registrant's classification after an induction notice has been sent, unless the board specifically finds that there has been a change in his status resulting from circumstances beyond his control—because he raised the C.O. claim only after he received his induction notice, even though it was clear that his beliefs had matured *prior* to that time. As we pointed out in our Memorandum in *Posner* v. *United States*, No. 151,

---

[2] 32 C.F.R. 1622.1(c) provides that "[e]ach registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board."

this Term,[3] despite the divergence of views in the circuits on the late crystallization issue, the courts of appeals are uniform in holding that when a timely claim is not made (the situation in the instant case), the exemption may be denied on that basis alone. We recognize, however, that the Court has recently granted review in *Ehlert* v. *United States*, No. 120, this Term, certiorari granted, May 4, 1970, to consider the question whether maturation of conscientious objector beliefs after the receipt of an induction notice constitutes a circumstance beyond the control of the registrant entitling him to reopening. Accordingly, the Court may wish to defer action on the instant petition pending its decision in *Ehlert*.[4]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

---

[3] We are providing petitioner's counsel with a copy of our Memorandum in *Posner*.

[4] Petitioner's contention that the congressional creation of a conscientious objector classification permits no administrative rule setting a deadline for the assertion of matured claims (Pet. 5-10) finds no support in the case law, including the dissent in *Ehlert*. See our Memorandum in *Posner*, *supra* p. 6, n. 4.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 397816 7